Due service and receipt of a copy of the within is hereby admitted

this.....*day of November, 1940.*

.....

.....

Counsel for Respondent,
Ida Louise Tarleton.

.....

Counsel for Respondent,
Mary Ann McElligott.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 576

CLARENCE DE VEUVE, etc., et al.,
Petitioners,

vs.

IDA LOUISE TARLETON, et al.,
Respondents.

BRIEF OF RESPONDENTS IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

JAMES D. MEREDITH,
705 California Street,
Sacramento, California,
Attorney for Respondents.

H. N. MITCHELL,
318 Ochsner Building,
Sacramento, California,
Counsel for Respondents.

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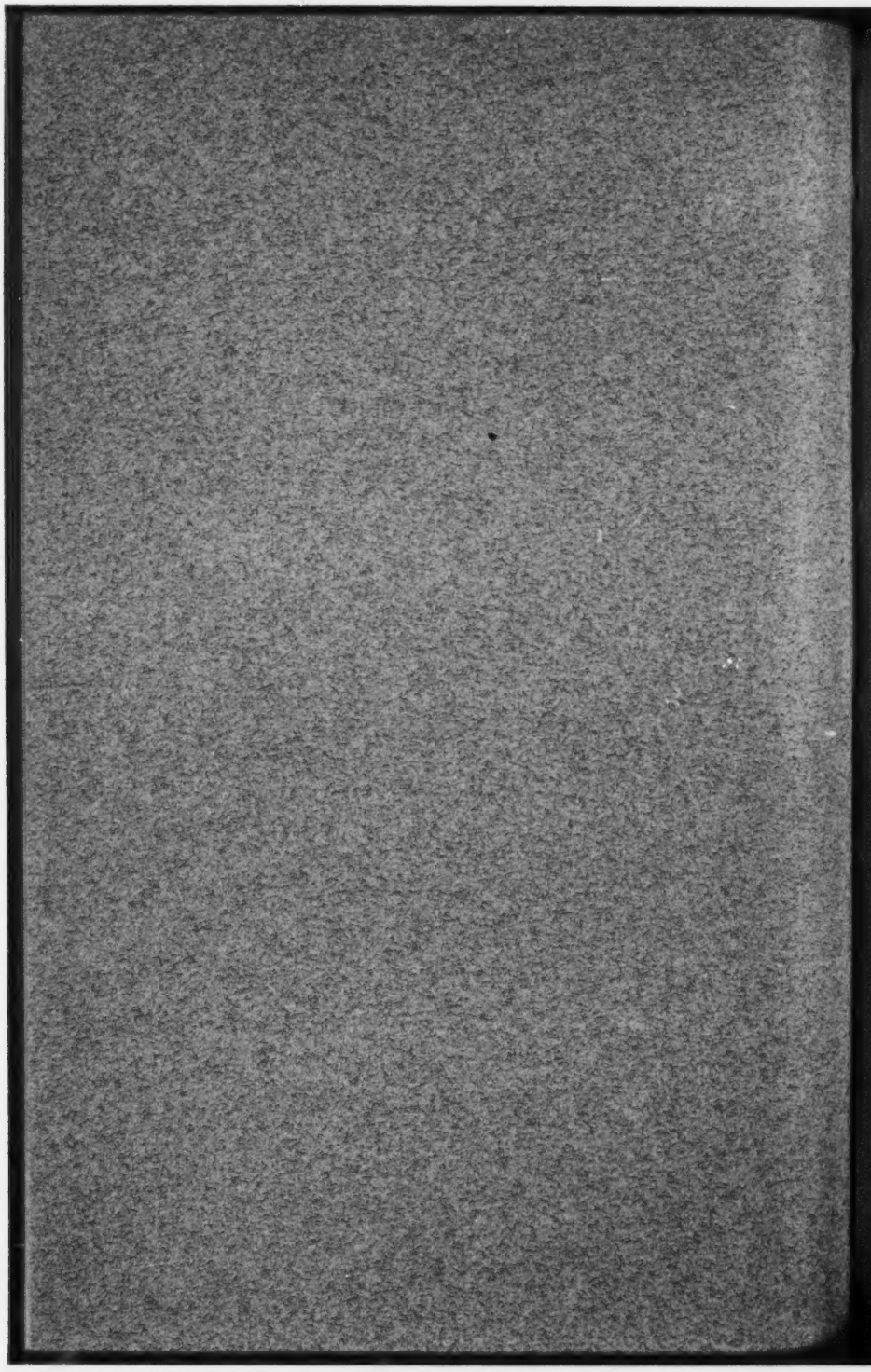

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IN THE

Supreme Court

OF THE

United States

No. 576, October Term, 1940

Clarence de Veuve, doing business under the firm name and style of San Francisco Underwriters of San Francisco, The Texas National Insurance Company of Dover, Delaware (a corporation), and The Security National Fire Insurance Company of Galveston, Texas (a corporation),

Petitioners,

vs.

Ida Louise Tarleton and Mary Ann McEllgott,

Respondents.

BRIEF OF RESPONDENTS IN REPLY TO PETITIONERS' BRIEF FOR ISSUANCE OF WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioners state their reasons for review on Writ of Certiorari herein to be:

(a) That the decision of tht Circuit Court in predicating its reversal of the District Court's judgment upon the ground that the Findings of Fact found no support in the evidence and, furthermore, "failed to apply" Rule 52 of the Rules of Civil Procedure for the District Courts: and

(b) That the decisions of the several Circuit Courts are not altogether harmonious, as Petitioners put it, in construing Rule 52, and, therefore, this Court should "authoritatively determine" the true construction of such rule: finally,

(c) That the Circuit Court in reversing the judgment of the District Court did not correctly apply the law of the State of California, as determined by its highest tribunal.

* * *

Respondents urge most respectfully that no ground exists herein for the issuance of Certiorari:

For the reasons—

1stly—That there is no federal question involved;

2ndly—That the decision of the Circuit Court scrupulously follows the existing law of the State of

California, as defined by its Supreme Court—its highest judicial tribunal;

3rdly—That there is no actual, nor even apparent, conflict between the decisions of the several Circuit Courts as to the interpretation of Rule 52 of the District Courts: The rule is so clearly written that interpretation would be almost supererogatory; and

4thly—That the decision of the Circuit Court here is in strict accord with the existing and controlling decisions of this Court on the questions raised by Petitioners.

* * *

THE FACTS, PROVEN WITHOUT CONFLICT OF EVIDENCE OR ADMITTED

Unless the material facts be accurately stated in any appellate proceeding, so that all parties may have an identic base upon which to predicate their several legal contentions, it is a muchly waste of time, both for Counsel to indulge in arguments and for Courts to entertain the same which are not addressed and do not meet the same specific issue.

Variable factual situations obviously create variable legal situations.

If one be permitted to disregard the record and to construct his own factual basis, it would be simplicity itself to erect a legal structure that would be unassailable.

So, here, Petitioners have rather flagrantly departed from the record and have asserted that certain facts exist, which asserted facts are directly opposite to the record.

As a justification for this harsh statement and as but a single instance of many which we will hereafter specify, we direct the Court's attention to the following statement on Page 43 of Petitioner's Brief, which reads as follows:

> ". . . c. Letter dated May 4, 1936, written on the stationery of the San Francisco Underwriters addressed to J. D. Richards (Record, Page 138), which in substance points out that the insured has a right to cancel the policy if she wishes but that *IF* the policy was in effect between March 5, 1936, and May 2, 1936, and a loss occurred, the insured would look to them for payment and requesting Richard to send check for $30 in payment of the premium."

The Court will note particularly the capitalized and underscored word "if," the use of which perverts the entire meaning of the exhibit referred to

From Page 138 of the Transcript we quote the letter verbatim:

> . . . PLAINTIFF'S EXHIBIT NO. 4
>
> Q. "You have today returned for cancellation San Francisco Underwriters policy SU68893 issued to Mary Ann McElligott, covering $5,000

against loss by fire on the gasoline station and grocery store on Auburn Boulevard, Sacramento, California. Now, Mr. Richards, if this assured does not wish this insurance, it is her privilege, of course, to cancel; but the fact remains she has been covered from March 5, 1936, to May 5, 1936, and had a loss occurred in the meantime, she certainly would have looked to us for payment, and, as you have neglected to send with the policy your check for the earned premium of $30.00 which is due this company (122), we are stating that unless this amount is paid within the next fifteen days it will be transferred to our collection agency for collection. Kindly, therefore, give this important matter your immediate attention. Very truly yours, Clarence de Veuve, General Agent, by Edward Brooks, Cashier."

This mis-statement of a most material fact by Petitioners is illustrative of the situation that confronts us in replying to their argument. Nor does it stand alone.

CHRONOLOGICAL STATEMENT OF FACTS.

We believe therefore that the time of the Court will not be impinged upon by a sincere effort to state the material facts in chronological order, supported in every instance by the record:

1—Respondent Mary Ann McElligott was and is the owner of a parcel of realty, improved by a frame building, in which she conducted a modest wayside store, situated on the Lincoln Highway, near Sacramento, California. (Transcript, pp. 145-6.)

2—Respondent Ida Louise Tarleton on April 24, 1926, loaned Respondent Mary Ann McElligott $4000.00, payment of which was secured by a first deed of trust upon Respondent Mary Ann McElligott's property; the entire principal of this loan, and interest thereon from the 15th day of May, 1930, remains unpaid. (Tr. pp. 161-2-3.)

3—On August 27, 1935, Respondent McElligott, the owner, requested one W. V. McGlone, engaged in a general insurance business at Sacramento, to have her property insured and kept insured against loss by fire by placing $4000.00 on the building and $1000.00 on the contents. (Tr. pp. 95-6-7.) McGlone agreed to do so and advised her from time to time that he was keeping her property insured, as requested. McGlone was neither an agent, representative or employee of either insurance company, petitioners here, nor did he claim or represent himself to be such. (Tr. pp. 188, 189, 107, 98.)

4 — McGlone placed this insurance in several companies anterior to the issuance of the policy herein involved, which prior policies were cancelled for undesirability of risk, non-payment of premium, or other causes, none of which are material herein. (Tr. 105, 110.)

5—Early in March, 1936, McGlone requested one Harold Hobbs, a traveling representative of Lumberman's Underwriting Alliance, an insurance company which had declined to assume the risk here involved, to place it with some other insurance company in San Francisco — instructing him to

have a policy written for $5000.00, of which $1000.00 was to be on McElligott's stock in trade, and $4000.00 on the building and to have a mortgage clause attached with Respondent Tarleton as the Mortgagee. (Tr. p. 99.)

6—On March 5, 1936, Petitioners here, transacting business in California under the name of "San Francisco Underwriters," issued their policy insuring Respondent McElligott, Owner, against loss by fire for a term of three years, in an amount of $1000.00 on contents and $4000.00 on building, and attached to the policy a Mortgage Clause, providing, inter alia, that in the event of loss to the building, the insurance thereon ($4000.00) should be payable to Respondent Tarleton, the Mortgagee, as her interest might appear, and also containing the other usual clauses of a Mortgage Clause. (Tr. pp. 23-44: Verbatim Policy and Mortgage Clause.)

7—Petitioners issued the policy (Tr. pp. 30-44) with Mortgage Clause with full contribution thereto attached (Tr. pp. 21-29) and delivered it unconditionally and in the ordinary course of business to an Insurance Broker, J. D. Richards in San Francisco, who had requested it (Tr. pp. 215-216), and who delivered it unconditionally to a certain Ulvilla, an employee in the office of the Company by whom Hobbs was employed. (Tr. p. 216.) Ulvilla thereupon mailed the policy, unconditionally and unaccompanied by any statement, letter, condition or restriction, to McGlone, in Sacramento, who was Respondent McElligott's agent to procure insurance. (Tr. pp. 210-100.)

8—McGlone retained the policy in his possession for practically 60 days (Tr. p. 116), although he tried unsuccessfully to see McElligott, the insured, desiring to collect or arrange for payment of premium. (Tr. p. 113.)

9—On May 2, 1936, McGlone, without the consent or knowledge of or notice to McElligott, the insured, or Tarleton, the Mortgagee, returned the policy to Petitioners, stating, "Due to sickness in family, the assured cannot meet premium at this time." (Tr. p. 115.)

10—Neither McElligott, the owner, nor Tarleton, the Mortgagee, authorized or directed McGlone to return the policy to the Petitioners nor had either of them any knowledge that he had done so, until long after the fire occurred which destroyed the insured property. (Tr. pp. 169, 192, 195.)

11—On May 4, 1936, and before any fire or loss had occurred, Petitioners wrote Richards, the Broker, at whose request and to whom they had issued and delivered the policy, and who in turn had forwarded it, via Ulvilla, to McGlone, the agent of the owner, McElligott, as follows:

"You have today returned for cancellation San Francisco Underwriters policy SU68893, issued to Mary Ann McElligott, covering $5,000 against loss by fire on the gasoline station and grocery store on Auburn Boulevard, Sacramento, California. Now, Mr. Richards, if this assured does not wish this insurance, it is her privilege, of course, to cancel; but the fact remains she has been covered from

March 5, 1936, to May 5, 1936, and had a loss occurred in the meantime, she certainly would have looked to us for payment, and, as you have neglected to send with the policy your check for the earned premium of $30.00 which is due this company (122), we are stating that unless this amount is paid within the next fifteen days it will be transferred to our collection agency for collection. Kindly, therefore, give this important matter your immediate attention." (Tr. pp. 137-139.

12—No verbal or written notice of cancellation, either of the policy of insurance or of the Mortgage clause thereto attached was given by Petitioners or either of them, or by any person claiming to act for them, either to McElligott, the owner and insured, or Tarleton, the mortgagee, and neither owner or mortgagee authorized, assented to, ratified or approved any attempted cancellation; May 14, 1936, McElligott paid on account of premium to McGlone. (Tr. pp. 163, 129.)

13—May 21, 1936, a fire totally destroyed the building and contents, described in and covered by the policy. (Tr. p. 141.)

14—Petitioners were immediately notified by telephone by McGlone of fact of loss. (Tr. p. 141.)

15—May 22, 1936, Petitioners, after being informed of fact of fire and loss, wrote to McGlone, stating that "the policy had been returned and cancelled flat and that the company had no liability under the contract. (Tr. p. 177.)

16—Within 60 days following the loss, proof of loss was made and delivered to Petitioners. (Tr. p. 18.) Petitioners refused to pay all or any part of the loss and have not done so. (Tr. pp. 19, 48.)

17—February 17, 1937, action was commenced in the Superior Court of the State of California, in and for the County of Sacramento, by McElligott, the insured, and Tarleton, the mortgagee, properly united in the same action, to recover the full amount of the policy from Petitioners. (Tr. pp. 11-44.)

18—April 2, 1937, upon the sole ground of "diversity of citizenship," the cause was removed upon Petitioners' Motion from the State Courts to the United States District Court for the Northern District of California (Tr. pp. 2-10.)

19—December 12, 1938, et seq., a trial was had in the District Court of the United States (Tr. pp. 94-239) by the Court, sitting without a jury. The Trial Judge filed no opinion.

20—On the 27th of March, 1939, the Trial Judge signed Findings (Tr. pp. 62-69), having theretofore denied motions by Respondents to amend and correct the Findings and to make them accord with the facts and the evidence. (Tr. pp. 71-84.)

ANALYSIS OF ADMITTED FACTS.

The policy with mortgage clause attached was ordered from Petitioner Insurance Companies in the regular course of business (Tr. pp. 215-6), was drawn up and duly countersigned by their authorized General Agent, C. deVeuve (Tr. pp. 221, 32, 228), and delivered

to the Insurance Broker who had ordered it (Tr. p. 216), who in turn delivered it to Ulvilla (Tr. pp. 209, 216), who in turn mailed it to McGlone (Tr. p. 210), Respondent McElligott's agent, to procure the same. (Tr. p. 100.

The policy with mortgage clause, duly issued as stated, was forwarded through the United States Mail to McGlone, the owner's agent, who had ordered it, and no letter, special or unusual instructions re delivery or non-delivery accompanied it. (Tr. p. 136.)

The policy was issued, dated and became effective "from the fifth day of March, 1936, at noon, to the fifth day of March, 1939, at noon" (Tr. p. 30), and delivered to Insured, as before stated.

There is no conflict in these facts.

The Petitioning Insurance Companies did not choose to question any of the foregoing facts, even by the testimony of one Clarence DeVeuve, their General Agent, and the party who actually countersigned the Policy and the Mortgage Clause, and the party who signed the letter, dated May 4, 1936, stating that:

> ". . . but the fact remains *she has been covered* from March 5, 1936, . . . and as you have neglected to send with the policy your check for the earned premium of $30.00 which is due this Company. . . ."

and which Clarence De Veuve was present in Court at the trial. (Tr. p. 101.)

Notwithstanding these unquestioned facts, proven by any uncontradicted evidence, Counsel state to this Court:

"There is no question but that the proof conclusively showed that the policy sued upon did not, in fact, ever come into effect." (Brief, p. 11.)

We refrain from expression of any opinion on this palpable departure from the record and evident intent to mislead, and beg to assure this Court that such practice is not common, even in California.

* * *

The whole case of the Petitioners seems to revolve around that one mis-stated fact, namely that the policy never became effective.

PAYMENT OF PREMIUM ON A FIRE INSURANCE POLICY IS NOT A CONDITION PRECEDENT.

Petitioners urge the fact that the non-payment of the premium by the insured, McElligott, in and of itself precluded the policy from becoming effective.

We take it to be settled law that *unless the payment of the premium be made a condition precedent*, the operation of the policy is in no wise deferred.

A distinction must be borne in mind between the ordinary life insurance policy, wherein it is usually, if not invariably, stated that "In consideration of the payment of the premium, etc., the company insures . . . ," and the ordinary fire insurance policy where the language is, as in the instant case, "In consideration of the stipulations herein named, and of $.....premium, does insure . . ."

In the former, the payment of the premium is made expressly a condition precedent.

In the latter, and as is invariably the practice in all fire insurance contracts, the payment of the premium is not a condition precedent to the operation and effectiveness of the policy.

Fire insurance policies throughout the entire United States, and in fact the world, barring a few isolated parts, are more or less standard in form, and in the United States and the British possessions the payment or prepayment of the premium is not an essential condition to the effectiveness of the policy.

The very language of the policy—the contract—precludes such construction.

It is settled law in California, construing fire insurance policies of identical language, that the prepayment of the premium is not essential to the effectiveness of the policy:

". . . *Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213, 222, 107 Pac. 292."

". . . *Farnun v Phoenix Insurance Co.*, 83 Cal. 246, 255, 23 Pac. 869.

"The policy in this case does not formally express receipt of premium, but it recites a consideration of $73.50 for the contract of insurance. . . ."

". . . The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay on a future day was binding on the plaintiffs, and could have been enforced by the defendants. . . ."

". . . *Sterling Fire Ins. Co. v. Comision Reguladora*, 143 N. E. 2, 6.

"Neither is the payment or tender of the premium a condition precedent to a recovery by appellee."

". . . *Couch on Insurance* §625, p. 2004."

The authorities cited by Petitioners in support of their contention that, there having been no payment of the premium upon the policy, therefore, and by reason thereof, the policy did not become effective, are cases involving life insurance policies, where it is the common practice to expressly provide in the policy itself, that the policy shall not become effective until the premium is paid.

(Tr. *Equitable Life Insurance Society v. McElroy*, 83 F. Rep. 631, 49 U. S. App. 548, 28 C. C. A. 365;

Union Central Life Insurance Company v. Pauloy, 8 Ind. App. 85, 35 N. E. Rep. 190.)

In both of these cases the policy expressly stated that

"In consideration of the annual payment in advance of a premium of $.....the Company does insure."

Obviously, a contract of insurance, be it life, fire, accident or automobile or any other kind which an insurance carrier may choose to write, which expressly provides that it is issued in consideration of the payment in advance of a certain stipulated premium, does not become effective until such stated premium has been paid or authorized and acceptable credit given.

ANALYSIS OF CONTENTIONS BY PETITIONERS FOR REVIEW

Presumably, to bring themselves within the purview of rule 38, subsections 2 and 5, of this Court, Petitioners specify a series of "Points" so-called and which they urge as sufficient reasons for the exercise of this Court's jurisdiction to review the Decision of the Circuit Court, reversing the judgment of the District Court.

Addressing ourselves, seriatim, as best we may, due to the overlapping and commingling of the "Points," so called, by Petitioners, it is at once obvious from a mere reading or narration of the reasons assigned that, in truth and in fact, no single special or important reason exists to justify the exercise by this Court of its discretion to grant a review on certiorari of the decision of the Circuit Court herein.

FIRSTLY

Petitioners invoke rule 32 of the Rules of Civil Procedure for the District Courts and assert that the Circuit Court erred in reversing the judgment of the District Court in holding that the findings of the District Court to the effect that the policy involved, "was never delivered to or accepted by" Respondents (Tr. p. 69), and,

> ". . . that the policy of fire insurance sued upon in this action was not in force or in effect on May

> 21, 1936, the date of the fire loss alleged in plaintiffs' complaint; that at no time was a contract for fire insurance entered into or executed by and between these plaintiffs, or either of them, on the one hand, and these defendants, or either of them, on the other." (Tr. p. 69.)

had no support in the evidence and that such findings by the District Court were contrary to the undisputed evidence in the case.

A mere re-statement of Petitioners' contention would seem to carry its own refutation.

If a Circuit Court upon appeal from a judgment of a District Court, in a case where the complete record, pleadings, evidence, rulings, etc., were used, has not the jurisdiction to reverse a judgment predicated upon findings having no support in the record, and, in fact, directly contrary to undisputed evidence, of what utility, as a revisory or reviewing tribunal, would a Circuit Court be?

In the instant case, the findings of the District Court, as pointed out and held by the Circuit Court, in its decision (Tr. pp. 266-272) found no support in the evidence, and were contrary to the evidence, and, therefore, the Circuit Court reversed the District Court's judgment.

It hardly seems justifiable for us to even engage this Court's attention in responding to Petitioners' weird

contention that rule 52 of the District Courts controls the Circuit Courts and, even this Court, in forbidding, on review upon appeal any reversal of a District Court's judgment, where its findings and judgment are not merely unsupported by any material evidence, but, as here, directly contrary to the undisputed record and the evidence.

The facility of a trial judge, indeed, his unquestioned right, to pass upon the credibility of witnesses who pass before him, does not, as Petitioners contend, supply that sine qua non of all contested cases, material and substantial evidence to support issues presented and found.

SECONDLY

Petitioners, in their "Point B" (Brief p. 33), with more brevity than accuracy, and, certainly, with more dearth of supporting authority, totally disregard the record, which was before the Circuit Court, and would trim from consideration by the Circuit Court, the very substance of facts and law which were presented to that Court, briefed and argued before it, considered and determined by it.

The opinion of the Circuit Court (Tr. pp. 256-281), with its considered, orderly and supported analysis and review of the evidence adduced before the District Court and of the findings of that Court, so at variance with such undisputed evidence, would seem to be the only response we need or should make to this Court.

As in support of their contention that the decision of the Circuit Court was in conflict with the decisions of their own (the Ninth Circuit) Court, Petitioners cite (Brief p. 35).

Anglo-California Nat. Bank v. Lazard, 106F (2nd) 693.

A mere reading of this decision will make clear that the Court followed the historic rule, that where there is substantial conflicting evidence, the finding of the trial court will not be disturbed.

Such is not the condition presented here. There was no evidence to sustain the trial court's finding. It is not a question of dispute in evidence, where the trial court might believe one witness or disbelieve him. There was no witness, no evidence, to sustain the trial court's findings; hence, the Circuit Court did what all Circuit Courts have done from their earliest establishment, they reversed the judgment.

Another authority cited by Petitioners is:

Occidental Life Ins. Co. v. Thomas, 107 Fed (2nd) 876.

The Court here merely stated the time-worn rule, that "the trial court's findings are not to be disturbed unless they are clearly erroneous. We are satisfied that the proof is sufficient to support the finding. . . ."

No one questions this most ancient rule.

Petitioners' citations from the several other Circuit Courts are all addressed to the same contention—a contention which, if applicable, no one would deny.

It would seem, therefore, that no benefit could accrue from the devotion of any more attention to these authorities.

Petitioners have simply misconceived the factual situation and upon such misconception have addressed many authorities to this Court, which have no relevancy to the instant case.

Petitioners in their "Point D" (Brief p. 40) suggest that the Circuit Court in its decision failed to observe the rule enunciated in:

> "*Erie v. Tompkins*, 304 U. S. 64, and
> 82 L. Ed. 1188,
> 58 Sup. Ct. 817.
>
> *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208."
> 84 L. Ed. 196,
> 60 Sup. Ct. 201.

in that it did not apply the law of the State of California as regards the burden of proof and presumptions.

This point is mentioned for the first time in this Court.

Petitioners made no reference to it in either the Trial Court or the Circuit Court of Appeals.

In substance, however, while the rule in California, as to the burden of proof, is the same as it is in every state, in that each party must prove his own affirmative allegations, this does not mean but what properly admissible evidence may come from the opposite side. Every trial attorney knows that it does.

Petitioners' discourse upon "the preponderance of evidence" leaves us in a haze as to what they really mean.

There has been no occasion at any stage of the proceedings to weigh the evidence, since there was no conflict.

The Preponderance of Evidence rule can only apply when there is some evidence to be placed on both sides of the scales; otherwise the evidence is not only preponderant, but as in the instant case, is wholly undisputed.

Petitioners (Brief pp. 42-43) refer to letters offered and received in evidence. The Court will note that the letter of Petitioners, dated May 4, 1936, in which Petitioners refer to the fact that the policy had been in effect and make a preemptory demand for a short rate premium, was written ante litem motam.

Whereas, the letter of Petitioners, written May 22, 1936, in which the Petitioners state that the policy had been cancelled "flat" (meaning no premium charged) was written post litem motam.

The antagonistic positions taken by Petitioners in these two letters is obvious and can only be explained by a common frailty of human nature, a frailty which is not excusable in reputable business organizations.

Petitioners' entire brief is permeated with not entirely accurate conceptions of the law of insurance.

For example, Petitioners state (Brief p. 50):

> "Whether or not the policy was in effect or not depends upon the delivery of the policy."

Of course, this is not the rule in California or any other state. Contracts of fire insurance may even rest in parole and ordinary country agents of fire insurance companies frequently bind their principals by verbal contracts of insurance.

Harrigan v. Home Life Ins. Co., 128 Cal. 531, 546.

> "It (delivery) is, therefore, a matter solely of intention. If it was intended that document should be in force before it was actually handed over, it will be deemed constructively delivered. . . ."

> "In Bliss on Life Insurance, section 150, it is said 'If the company so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made, or if such payment is not a condition of the policy's taking effect, or, being a condition, is waived, the contract is then complete, and the company cannot revoke its acceptance, though the policy had not been delivered.'"

"To the same effect is I May on Insurance, 97; I Beach on Insurance, sec. 482; Richards on Insurance, 54; Elliott on Insurance, sec. 14; I Wood on Insurance, 49; Ford v. Buckeye etc. Ins. Co., 6 Bush 133; 99 Am. Dec. 671, note."

"It is concluded that the delivery is complete when sent to the local agent to be unconditionally delivered, and, though it was lost on the way, it was nevertheless the property of the insured."

1 *Couch on Insurance* §125, p. 231.

"As a general rule, the deposit of a policy in the mails, properly stamped and addressed to the Insured, is a delivery to him. . . ."

"And as mailing direct to the insured has been held in effect a delivery, so mailing a policy to the insured's broker, who procured the insurance, constitutes delivery to the insured. . . ."

". . . In the absence of some such known or obvious restriction or incompleteness, the insured's possession of a policy creates a presumption of proper delivery after performance of all conditions precedent."

Khan v. Royal Indemnity Co., 39 Cal. App. 183.

"As to the claim that the policy was never delivered to the insured, and that because of the fact Plaintiff should not be bound by the statements contained in the application attached thereto, it is sufficient to say that the policy was delivered to one Seigel, who had procured the policy at the

instance and request, and as the broker, of deceased. The possession of the policy by his broker was as effectual as possession by the insured."

Sterling Fire Ins. Co. v. Comision Reguladora,
143 N. E. 2, 6

"A contract of insurance is complete when the contract is executed by the insurer or its authorized agent with the intention to be bound, even though the policy or contract remains in the possession of the insurance agent for the purpose of being delivered to the insured, and, if the insurance agent is also an agent of the insured to keep the property covered, a substituted contract of insurance is complete without being actually delivered to the insured. Dibble v. Northern Assur. Co., supra; Hamm Realty Co. v. New Hampshire, etc., Co., supra; 26 Corpus Juris, p. 58, and cases cited."

THE CIRCUIT COURT OF APPEALS LITERALLY AND ACCURATELY APPLIED THE LAW IN CALIFORNIA TO THE FACTS IN THE INSTANT CASE.

In conformity with established procedure, as enunciated by this Court in:

Erie Railroad Co. v. Tompkins,
304 U. S. 64,
82 L. Ed. 1188,
58 Sup. Ct. 787;

Cities Service Oil Co. v. Dunlap,
308 U. S. 208,
84 L. Ed. 196,
60 Sup. Ct. 201;

the Circuit Court in its decision strictly and accurately applied the law of the State of California, as declared by its Supreme Court, its highest Court.

The question passed upon was, assuming that a policy of fire insurance, with a standard mortgage clause attached had been issued and delivered and had become effective, could there be a cancellation of such policy and mortgage clause simply by the physical return of the policy to the Insurers by one who had no authority from either the insured or the mortgagee and where the modes of cancellation, expressly set forth in the policy and mortgage clause, were not followed.

Petitioners assert the contrary (Brief p. 65), and cite as controlling:

Ferrar v. Western Assur. Co.,
30 Cal. App. 489,
159 Pac., 611.

It must be borne in mind at all times that this action involves two separate and independent contracts—the Policy, with Respondent McElligott as the owner and Insured, and the Mortgage Clause with Respondent Tarleton as the Mortgagee.

Each of these contracts contains wholly separate and distinct methods by which the liability of the Insurers might be terminated or cancelled.

Supra, we set forth these separate methods.

CANCELLATION AS TO RESPONDENT McELLIGOTT

McGlone was McElligott's agent *"to insure and keep insured her property."*

The testimony, and the only testimony as to McGlone's authority from McElligott, is as follows:

Testimony of Mary Ann McElligott:

> "A. Well, I don't know if it was or not. I paid him $60.00 all together, and he said he was keeping my insurance covered. . . ." (Tr. 188.)
>
> "A. Yes, right along he (McGlone) told me he was keeping my—my property covered. . ." (Tr. 189.)
>
> "A. He (McGlone) told me he would keep me covered, but I don't know whether it was in reference to that conversation, but he told me he would keep me covered.
>
> Q. And it was satisfactory to you if he kept you covered with insurance, no matter what company your insurance was placed in, is that a fact?
>
> A. Yes, if he kept me covered." (Tr. 105.)
>
> "A. Well, I might be stupid, Mr. Murphy, but I don't understand. All I know is I paid Mr. McGlone and he told me that he would deliver the policy to Mr. Richards, Mrs. Tarleton's attorney." (Tr. 201.)

We stress this matter of McGlone's authority from McElligott, because an agency "to insure and keep insured" is vastly different from an agency merely to insure.

This is important, only so far as McElligott, the owner, is concerned, and does not affect the Insurer's liability to the Mortgagee, Tarleton.

> *Lauman v. Springfield Fire Ins. Co.*, 184 Cal. 650, 652, 195 Pac. 50,

would seem to answer our contention that where an "agency to insure and keep insured" exists, as here, the agent has no authority *to cancel and leave the property uninsured.*

> "But the authority to keep the property insured would not be authority to consent to a cancellation of insurance which would leave the property wholly without insurance. In this case the effect of the agreement to cancel the insurance was to leave the mortgage without any protection. . . ."

The case of

> *Ferrar v. Western Assur. Co.*, 30 Cal. App. 489, 159 Pac. 609:

cited by Petitioners is clearly distinguishable, in that in holding that

> "a general agent with power to insure property and keep it insured may accept notice of cancella-

> tion and procure substituted insurance or renewal of insurance in another company. . . ."

the agent replaced the cancelled insurance policy with other coverage and at all times kept the owner's property insured.

Not so, in the instant case.

If McGlone, as the agent of McElligott, "to insure and keep insured her property" had cancelled the instant policy and had replaced it with other coverage, there would and could be no question about his authority so to do.

But, having no authority to cancel without replacement, his attempted cancellation of the policy was futile, so far as McElligott is concerned.

Also, in the *Ferrar* case, the additional element of ratification was present.

This distinction is made in *Lauman v. Springfield Fire Ins. Co.*, infra, a later case.

The most recent judicial enunciation in California is found in

> *Emery v. Pacific Emp. Ins. Co.*, 67 P. (2d) 1046, 1051, 8 Cal. (2d) 663,

where, *inter alia*, the Court states:

"It is true that Exhibit G was not addressed to the insured, but to Strother & Strother, brokers, who had procured the insurance for Bronis. It is held that an agent of the insured to procure insurance is not an agent for cancellation, and notice of cancellation to such broker is not notice to the insured. Farnum v. Phoenix Ins. Co., 83 Cal. 246, 256, 23 P. 869, 17 Am. St. Rep. 233; Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 P. 58, 10 L. R. A. 144; Croenwett v. Iowa Underwriters of Dubuque Fire & Marine Ins. Co., 44 Cal. App. 571, 575, 186 P. 842; Hooker v. American Indemnity Co., 12 Cal App. (2d) 116, 54 P. (2d) 1128; Richards, Law of Ins. (4th Ed.) §271, p. 450."

We, therefore, believe that as to McElligott, the owner, the return of the Policy to the Insurers by McGlone, her agent "to insure and keep insured" her property, did not operate as a cancellation or termination of the Policy, and, that the risk assumed by Insurers continued and was existent at the time of the fire loss.

CANCELLATION AS TO RESPONDENT TARLETON, THE MORTGAGEE.

Whether the Policy was cancelled or not in nowise affects the liability of Petitioners to Tarleton, the Mortgagee.

Admittedly, the Mortgage Clause was executed, at the request of the owner, McElligott, by Petitioners, contemporaneously with the execution of the Policy (Tr. 21-29).

When the Petitioners executed this Mortgage Clause and attached it to the Policy and delivered it unconditionally to the broker Richards, and via mesne persons forwarded it to McGlone, McElligott's agent "to insure and keep insured" her property, the Mortgage Clause, of course, became an operating contract of indemnity between Petitioners and Tarleton.

Its terms were clear and definite.

It plainly and expressly provided that "no act or neglect" on the part of the Insured would invalidate it.

If the Insured, McElligott, could not by express contractual language invalidate this Mortgage Clause, how could McGlone be held to have the power to do so?

THE FACT THAT THE MORTGAGEE HAS NO KNOWLEDGE OF THE POLICY O RMORTGAGE CLAUSE UNTIL AFTER THE LOSS, IS WHOLLY IMMATERIAL

> "Nor is acceptance by a mortgagee essential to the completion of a contract evidenced by a Standard Mortgage Clause in a fire insurance policy, for *a Standard Mortgage Clause is valid and enforceable although the mortgagee had no knowledge of the existence of the policy until after the loss*" (citing authorities).
>
> 5 *Couch on Insurance*, §1215, p. 4424.

In the case at bar, Tarleton, mortgagee, was temporarily out of the State during the time that the events

herein, appertaining to the issuance of the Policy and Mortgage Clause here sued upon and loss thereunder, transpired.

Admittedly, she had no knowledge of the execution of the Mortgage Clause in her favor until some six weeks after the loss.

Admittedly, no notice of any cancellation of the Policy or of the Mortgage Clause was given or attempted to be given by Insured or any one else to her.

It is evident from the record—the testimony is uncontradicted — that under the terms of the Deed of Trust, executed by the owner of the property, McElligott to Tarleton, Mortgagee, that the obligation to insure the interest of the Mortgagee rested upon McElligott by the express language of the Deed of Trust (Appellants' Exhibit 6) (Tr. 147).

McElligott performed her obligation to Tarleton in this respect (Tr. 201).

Union Institution for Savings v. Phoenix Ins. Co., 81 N. E. 994, 196 Mass. 230, 14 L. R. A. (N. S.) 459:

"The mortgage contained a covenant that the mortgagor should keep the property insured for the benefit of the mortgagee The mortgagor, one Surbridge, procured the policy, but did not inform the plaintiff of it, and the plaintiff had no knowledge of it until after the fire.

It is *also immaterial that the plaintiff, at the time of the fire, had not been informed of the action taken by the morgagor for its benefit, under its authority.*"

In

Gilman v. Commonwealth Ins. Co., 92 Atl. 721, 112 Me. 528, 1915C L. R. A. 758,

is found a set of circumstances quite similar to those in the instant case, in that the Mortgagee had no knowledge of the issuance of the Policy and Standard Mortgage Clause until after the loss, and, in addiion, the Insured had prior to loss requested cancellation, but no notice thereof was conveyed to the Mortgagee: the Court held the Insurer bound to the Mortgagee.

Similarly, in

Eddy v. London Assur. Corp., 143 N. Y. 311, 25 L. R. A. 686,

it was held that additional insurance taken out by the mortgagor, or owner, without the consent or knowledge of the mortgagee, could in no wise affect an existing and valid policy with a standard Mortgage Clause attached.

ACCEPTANCE OF THE POLICY WAS NOT REQUIRED BY THE MORTGAGEE TARLETON TO COMPLETE THE CONTRACT.

Federal Land Bank v. Atlas Assur. Co., 125 S. E. 631, 634, 188 N. C. 747:

"The Atlas Company also takes the position that, as Federal Land Bank of Columbia had no knowledge of the existence of the policy issued by it until after the buildings had been destroyed by fire (eighth issue above), the same may not now, after a loss has occurred, be accepted and ratified by the said beneficiary under the standard mortgage clause attached thereto."

"The contract of insurance was procured by C. C. Greenwood, who had an insurable interest in the property at the time, and who had a right to enter into the contract. The policy was issued with a rider, or standard mortgage clause, attached thereto, in which the Federal Land Bank of Columbia, as mortgagee or trustee, was named as the first beneficiary as its interest might appear."

"*Nor did it require an acceptance on the part of the mortgages or trustees to complete the contract.* It was made by competent parties for their benefit, as their interests might appear, and it was expressly agreed by the Atlas Company that 'this insurance, as to the interest of the mortgagee, or trustee, only, herein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property'"

THE MORTGAGE CLAUSE WAS NEITHER CANCELLED NOR ATTEMPTED TO BE CANCELLED.

Petitioners concede that Appellant Tarleton, the Mortgagee, "knew nothing of the Policy until after the fire loss" and "she had no knowledge of its existence" and "that no demand for premium or notice thereof was given to her (Tarleton)."

If the action of McGlone, as McElligott's agent "to insure and keep insured" her property, in returning the Policy with the Mortgage Clause attached to Respondents with request that it be cancelled, be held to have been within the scope of his agency, which we believe authority holds definitely not to have been so, and, if sequentially, it should be held that the Policy insuring McElligott was cancelled, or whether it be held that McGlone's action, so far as McElligott, his principal, was concerned, was wholly *ultra* his power and authority, *in either event*, the *Mortgage Clause was not cancelled, and continued in force* and afforded Tarleton indemnity against loss by fire.

There is an absolute unanimity of authority that the rights of the Mortgagee under a Standard Mortgage Clause, as here used, *cannot be vitiated, cancelled or terminated, without notice to the mortgagee*, save by expiration of the expressed term of the coverage.

Succinctly, this rule is stated in

6 *Couch on Insurance*, §1439, p. 5093:

"Notice to the Mortgagee is a prerequisite to cancellation under a standard policy containing a mortgage clause."

Gilman v. Commonwealth Ins. Co., 112 Me. 528, 92 Atl. 721;

Lauman v. Springfield Fire Ins. Co., 184 Cal. 650, 195 Pac. 50.

In the *Lauman* case, there was a Mortgage Clause attached to the Policy, identical with the one here involved, save as to parties and amounts.

The Court, speaking through Justice Wilbur, says:

"No notice whatever was given to the mortgagee." "The notice given to the Mortgagor was not communicated to the Mortgagee, and was in no sense notice to the mortgagee. The conclusion of the trial court that the plaintiff Dodd was not notified of the cancellation of the policy as required by its terms is justified by the evidence. The policy of insurance was therefore in force at the time of the fire and the judgment of the superior court to that effect was correct."

Rawl v. American Cent. Ins. Co. (S. C.), 77 S. E. 1013, 45 L. R. A. (N. S.) 463, see note;

Federal Land Bank v Atlas Assur. Co., 125 S. E. 631, 635 (N. C.).

It requires something besides an utter lack of comprehension of the refinement of settled insurance law, to fly thusly, as Petitioners do, in the face of a very clearly expressed covenant in the Mortgage Clause, prescribing the method and mode of cancellation of the mortgagees' rights thereunder, but, also, to hurl themselves against that other potent provision in the Mortgage Clause that *"the interest of the mortgagee only herein shall not be invalidated by any act or neglect of the mortgagor or owner. . . ."*

These clauses, it is to be remembered, were placed in the Mortgage Clause by the Insurers.

To ignore them, by any ingenious device of language, or an appeal to pathos, is scarcely becoming the foundation stone upon whose sanctity it is well said, civilization itself does rest.

We repeat that these pleas of Petitioners to escape liability to the Mortgagee, Tarleton, upon their solemnly executed contract are not addressed to mere credulity, but are insultive of rational and ordered thinking.

As sustaining our views, many of the authorities herein cited, overlap and pass directly upon the position we have stated that the Mortgagee, Tarleton, assumes.

Union Trust Co. v. Philadelphia Fire & Marine Ins. Co., 145 Atl. 243, 247 (Me.).

"There may also be said to be practical unanimity in the authorities that under such 'union mortgage clause' no act or default by the mortgagor or owner after the inception of the policy, if unknown to the mortgagee, though invalidating the policy as to the mortgagor or owner, will invalidate the contract of insurance between the mortgagee and the insurer, as will appear in the cases above cited."

"A strong preponderance of authority, however, is in favor of holding that any acts or neglect of the mortgagor or owner whether prior or subsequent to the inception of the policy, will not invalidate the rights of the mortgagee under a 'union mortgage clause.'"

Walker v. Queen Ins. Co., 136 S. C. 144, 134 S. E. 263, 52 A. L. R. 259.

Germania Fire Ins. Co. v. Bally (Ariz.), 173 Pac. 1052, 1 A. L. R. 488, 492.

"... The insurance clause attached to the policy in terms provides that the policy shall not be invalidated as to the mortgagee's interest by reason of any act or neglect of the mortgagor or owner, and, according to the majority of the authorities, this affords protection against previous acts as well as subsequent acts of the insured. As is well known, many insurance policies are issued, primarily, to protect mortgages. In fact, it is made a condition of the mortgage, as in this case, that the insurance shall be carried by the owner of the property to protect the interests of the mortgagee. This exaction by the mortgagee is well known to the insur-

ance companies, and they are only too glad to take this risk. The insurer issues the policy to the mortgagor. It is a contract between the mortgagor and the insurance company. The mortgagee is not interested after its execution, when the mortgage clause is attached to the policy for his protection. We think the mortgagee, when a policy is presented to him with a standard mortgage clause attached thereto in his favor, is justified in assuming that the insurance company has satisfied itself that the policy is valid and free from impeachment for any conduct or act of the assured at its inception, or prior to the attachment of the mortgage clause. The authorities are not agreed on this proposition, but we think the better reason is with those that hold the rights of the mortgagee are unaffected by any act or neglect of the insured, as well before the attachment of the mortgage clause as afterward."

* * *

Without conflict, the evidence showed, as is demonstrable from an examination — even a most cursory examination — of the Record,

(1) That the Policy, with the Mortgage Clause attached, was issued at the request of the Insured, McElligot, through her Agent, McGlone (Tr. 111).

(2) That the Policy, with the Mortgage Clause attached, was executed and delivered unconditionally and with no restrictions, first and directly to the broker, Richards, who ordered it (Tr. 215, 216),

and thence to Ulvilla, and, via mail from Ulvilla to McGlone (Tr. 224, 225); McGlone received it "without any special instructions or directions" or conditions accompanying it (Tr. 111, 136). It was executed and delivered in the ordinary course of business and precisely as thousands of other fire insurance policies are issued and delivered daily: Petitioner's letter of May 4, 1936 (Exhibit 4), expressly admits execution, delivery and effectiveness of policy;

(3) That McGlone was the agent only of the owner, McElligott, and his authority was "to insure and keep insured" her property, and his attempt to surrender for cancellation the Policy, without replacement of the risk, was beyond any authority he possessed, and, hence, the Policy could not have been legally cancelled as to McElligott; no notice of cancellation was given by the Insurer to McElligott;

(4) That by virtue of the express terms of the mortgage clause, nothing which the Insured McElligott, or her agent, McGlone, did or could have done, invalidated or affected or destroyed the insurance upon the interest of the mortgagee, Tarleton;

(5) That it is wholly immaterial that the Mortgagee Tarleton did not learn of the Policy or more particularly of the Mortgage Clause, until after the fire loss;

(6) That the Petitioners neither gave, nor attempted to give, to Mortgagee Tarleton, any notice of cancellation of the Policy or Mortgage Clause, or even of any desire to retire from the risk; they demanded the earned premium before they learned of the loss, and then politely, but not for reasons of politeness, waived the same after learning of the loss.

McElligott based her claim upon the Policy and that it was not terminated by any unauthorized act of McGlone, and was in force at the time of the fire;

As to the Mortgagee, Tarleton, the Record discloses — without contradiction — that the Mortgage Clause attached to the Policy was a legal, binding obligation executed by the Insurers, in full vitality at the time of the fire.

THE LAW OF THE STATE OF CALIFORNIA.

In the Circuit Court, as here, Petitioners urged that the law of the State of California, applicable to cancellation of fire insurance policies, was as set forth in:

Ferrar v. Western Assurance Co.,
30 Cal. App. 489,
159 Pac. 609; and

Stevenson v. Southern Insurance Office,
17 Cal. App. 280,
119 Pac. 529.

Both of these cases were decided by District Courts of Appeal, which are not courts of last resort in California.

Both of these cases were later considered, analyzed and distinguished by the Supreme Court of California, and the law declared to be as we have contended it to be, both in District and Circuit Courts, and here, in

Lauman v. Springfield Fire Ins. Co.,
184 Cal. 650,
195 Pac. 50,

to the extent, if any, that Ferrar v. Western Assurance Co. conflicted with the rule here contended, it necessarily was overruled.

It would seem supererogatory for us to attempt to respond further to the contention of Petitioners, that the Circuit Court did not follow the established and prevailing rules of law in California, in view of the elaborate and studied opinion of the Circuit Court, which considered every California case pertinent to the question—and more—and so lucidly pointed out what the Supreme Court of that State had declared the law to be.

Succinctly, said Circuit Judge Garrecht, in responding to Petitioners' contention, there made, as here, that the California law was found in Ferrar v. Western Insurance Co.:

"If there were no other cases from California to guide us than Stevenson v. Sun Insurance Office, 17 Cal. App. 280, and Ferrar v. Western Assurance Co., 30 Cal. App. 489, we might feel an obligation to sustain ap-

pellees' position as to the effect of the attempted cancellation on Mrs. McElligott's claim. However, these cases have been distinguished by the California courts. Thus, in the case of Lauman v. Springfield Fire etc. Ins. Co., 184 Cal. 650, 652, the court said:

> "... It is held in *Ferrar v. Western Ins. Co.*, 30 Cal. App. 489 (149 Pac. 609), ... that where a broker or agent is employed to keep the property insured, he had the authority to cancel as well as to procure insurance. But the authority to keep the property insured would not be authority to consent to a cancellation of insurance which would leave the property wholly without insurance."

In the case at bar, if there had been a cancellation, the property would have been wholly without insurance. It seems now to be well settled by the California decisions that an agent of the insured to procure insurance is not an agent for cancellation, that in order to defeat an action upon a policy of insurance on the ground that the policy was cancelled, it must be shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with or that the insured, knowing all the facts, waived such compliance. (Quong Tue Sing v. Assurance Corp., 86 Cal. 566; Emery v. Pacific Employers Ins. Co., 8 Cal. 2d 663; Hooker v. American Indemnity Co., 12 Cal App. 2d 116.)

The policy here having been in effect and the agent being without authority to cancel it, the company was

required, before the policy could be cancelled, to comply with the terms of the policy and give notice. It is admitted that this was not done. It follows that the policy was in effect at the time of he fire, and appellant McElligott is entitled to recover as her interest may appear."

Petitioners' effort to escape the ruling of California's Court of dernier resort, as enunciated in

Lauman v. Springfield Fire Ins. Co., infra

by characterizing that decision as "dictum" (Brief p. 69) manifests either a crudity in interpretative ability or, what is wholly unconceivable, the naive belief that this Court would accept such a characterization of a pivotal case, rather than examine it itself.

* * *

IN CONCLUSION, IT IS SUBMITTED.

That there exists no basis for a review of the decision of the Circuit Court in the instant case—

For the reasons:

(A) No Federal question or question of any special public interest is involved.

(B) That the judgment of the Circuit Court scrupulously followed the law of the State of California on all matters germane or relevant to the issues involved.

(C) That the decision of the Circuit Court does not conflict, as contended by Petitioners here, either, with prior decisions of the same Circuit Court nor with the decisions of other Circuit Courts, nor with any decision of this Court.

It is respectfully submitted that the Petition for review upon Writ of Certiorari be denied.

Dated, Sacramento, California,
February 5, 1941.

JAMES D. MEREDITH,
Attorney for Respondents.